UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

MERCEDES-BENZ U.S. INTERNATIONAL, INC., (MBUSI)	)	
and	)	**CASE 10-CA-226249**
KIRK GARNER, AN INDIVIDUAL,	)	

MERCEDES-BENZ U.S. INTERNATIONAL INC.'S CROSS-EXCEPTIONS

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I. INTRODUCTION

Mercedes-Benz U.S. International, Inc. (“MBUSI”) files these cross-exceptions to the Administrative Law Judge’s (“ALJ”) decision in the instant case. The complaint alleged two Section 8(a)(1) violations of the National Labor Relations Act (the "Act"): (1) a MBUSI supervisor unlawfully made a threat of unspecified reprisals for unspecified conduct when he told Charging Party Kirk Garner (“Garner”) not to "disrupt the group;" and, (2) a MBUSI supervisor unlawfully polled employees when he asked them if they were willing to perform a job duty after MBUSI was told no employees would perform the job duty.

After an evidentiary hearing, the ALJ rejected both allegations and dismissed the complaint in its entirety. However, on August 21, 2019, Counsel for the General Counsel (“CGC”) filed exceptions which largely except to the ALJ’s credibility determinations and the ALJ's subsequent conclusions based on his credibility determinations, and rely upon legal authority that has no applicability. As discussed in MBUSI’s answering brief, filed on September 6, 2019, the judgments of the ALJ with regard to the credibility of witnesses and the weighing of evidence are amply supported by the record and should not be disturbed. CGC’s exceptions failed to show that any aspect of the ALJ’s decision was incorrect, and the ALJ correctly concluded the case was due to be dismissed.

Nevertheless, MBUSI files these cross-exceptions, in an abundance of caution, to address two procedural aspects the ALJ failed to address in ruling in MBUSI’s favor. First, while the ALJ correctly ruled there was no unlawful threat, the ALJ merely needed to apply the work rule test from *Boeing Co.*, 365 NLRB No. 154 (Dec. 14, 2017) to determine the challenged statement was lawful. Second, while the ALJ correctly concluded there was no unlawful polling or interrogation, the ALJ merely needed to determine MBUSI could not have engaged in "polling" because it did

not inquire into any employees' union sentiment, and the ALJ should have rejected CGC's attempt to inject an interrogation theory into the case after trial.

II. EXCEPTIONS

MBUSI, pursuant to Section 102.46(a) of the Board's Rules and Regulations, files the following exceptions to the ALJ's decision in this matter. The portions of the record and authority relied upon to support these exceptions are cited and discussed below.

1. The ALJ erred in failing, on page 3, line 30 to page 3, line 7, to consider the controlling application of *Boeing Co.*, 365 NLRB No. 154 (Dec. 14, 2017) ("Boeing Co.") to determine the challenged statement was lawful. In *Boeing Co.*, the Board created Category 1 rules that it designated as lawful. 2017 NLRB LEXIS 634, at *13. Category 1 rules include the "harmonious interactions and relationships" rule previously deemed unlawful in *William Beaumont Hospital* 365 NLRB No. 162 (2016) as well as rules "requiring employees to abide by basic standards of civility." 2017 NLRB LEXIS 634, at *13. Further, Category 1 rules certainly include those prohibiting unlawful partial strikes. *Id*. at *13-18.

Here, the challenged communication to not "disrupt" the group was nothing more than the articulation of MBUSI's lawful work rule principles of civility and teamwork and that illegal work interference is not permitted. MBUSI's work culture centers on the One Team approach which emphasizes civility, respect and teamwork in the work place. (Fillmore, 53:11-14, RX-2).[1] The One Team approach also prohibits illegal work interference. (Id.). Garner repeatedly expressed his disdain to the presence of contractors. (Fillmore, 30:9-20, 33:15-34:2, 87:18-88:4, 90:15-22, 96:15-23; Garner, 144:4-145:14; RX-6). Garner repeatedly stated that he and his co-workers did

[1] References to the one-volume transcript and/or the ALJ's decision ("ALJD") will appear as page number: line number. CGC's hearing exhibits will appeal as "GCX" and MBUSI's exhibits as "RX."

not want to perform their training job duties, which the ALJ found could constitute a partial strike. (ALJD, fn. 4) ("[i]t would not have been illegal for Ivory to tell employees that if they came to work, they would be required to train the temporary workers.") (ALJD, fn. 7) ("a mass refusal to perform an assigned task could be an illegal partial strike."). Garner even went so far as to say he would not train the contractors and MBUSI would be "embarrassed" by how the contractors would be treated. (ALJD, 3:12-14). After Garner stated MBUSI would be "embarrassed" by how the contractors would be treated, Front Line supervisor Don Fillmore simply and politely explained to Garner that they have work to do and asked him to not "disrupt" the group. (ALJD, 3:12-15). There was no threat. (ALJD, 3:35-36; Fillmore, 94:15-25)("Fillmore did not hint at any adverse consequences if Garner continued to refuse to perform this training"); (ALJD, 3:31-32)("Fillmore also did not threaten Garner will any adverse consequences if Garner encouraged other employees to opt out of the training."). Garner was not disciplined and the work rule was not enforced against him.

Thus, this case merely requires application of the *Boeing Co*. analysis, which establishes work rules dealing with civility and work interference, such as the one here, are lawful. CGC cannot circumvent *Boeing Co*. by changing the work rule case theory from the first two versions of the unfair labor practice charge (GCX 1(a), 1(c)) into a threat case. Rather, because this case involves a work rule, the unlawful work rule allegation is due to be dismissed pursuant to the Board's holding in *Boeing Co*.

2. The ALJ erred in failing, on page 4, line 12 to page 5, line 5, to consider CGC only pled an unlawful polling case theory that was deficient on its face and CGC could not inject an interrogation theory into the case after trial. In the amended unfair labor practice charges, the complaint and at the hearing, CGC only asserted an unlawful polling allegation. (GCX 1(c), 1(e)

1(g)). Indeed, in his opening statement at hearing CGC stated: "[b]y Supervisor Ivory's follow-up of unnecessary coercive polling regarding protected concerted activities, Respondent has unlawfully polled employees, in violation of Section 8(a)(1) of the Act" and CGC never mentioned interrogation. (Webb, 9:3-9). Unlawful polling requires an inquiry into employees' union sentiment (*i.e.*, an observable choice as to whether the individual supports the union such as, for example, whether the employee will support the union in a strike). Indeed, a substantial body of Board case law had developed with respect to under which circumstances an employer can lawfully "poll" employees about union matters[2] and what safeguards are required.[3] Further, important "free-speech" considerations must be considered.[4] While polling may take many forms,[5] the essential harm in unlawful polling is that employees are forced to reveal their union sentiments to their employer without appropriate safeguards.[6]

Here, it is undisputed that front line supervisor Timothy Ivory did not inquire into employees' union sentiments. He did not ask employees about their support for a union. (ALJD, 4:36-38). He did not ask them to engage in any conduct that would reflect whether they supported

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[2] Public Serv. Co. of Okla., 334 NLRB 487 (2001) (communication requesting that employees respond if they no longer wished to be represented by union violated the Act), enfd., 318 F.3d 1173 (10th Cir. 2003); Nation-Wide Plastics Co., 197 NLRB 996 (1972) (employer cannot disclaim results of secret ballot poll to determine union's majority status).

[3] Struksnes Constr. Co., 165 NLRB 1062, 1063 (1967) (An employer, however, can defend a claim of unlawful polling by establishing "the purpose of the poll must be to determine the truth of the union's claim to a majority" and that purpose was communicated to employees).

[4] 29 U.S.C. § 158(c) provides that: "The expressing of any views, argument, or opinion, or the dissemination thereof ... shall not constitute or be evidence of an unfair labor practice ... if such expression contains no threat of reprisal or force or promise of benefit."

[5] For example, a "union truth quiz" was held unlawful polling, Sea Breeze Health Care Center, Inc., 331 NLRB 1131, 1132-33 (2000); distribution of anti-union paraphernalia in a manner that pressured employees to make an observable choice about the union was unlawful polling; A. O. Smith Auto. Prods. Co., 315 NLRB 994 (1994); and requests to sign a written request for exclusion from an anti-union video was unlawful polling, Allegheny Ludlum Corp., 333 NLRB 734 (2000), enfd., 301 F.3d 167 (3d Cir. 2002).

[6] Space Needle, LLC, 362 NLRB 35 (2015), enfd., 692 F. App'x 462 (9th Cir. 2017).

a union. (Id.). Ivory's inquiry into employees' willingness to train would not, and did not, reveal their union sentiment. (ALJD, 4:38-40, 5:1-2). Without any conduct that could be considered an inquiry into union sentiment, there can be no polling as a matter of law.

It is not surprising then that CGC, for the first time, injected an unlawful interrogation theory into his post-hearing brief. (CGC Post-Hearing Brief, pg. 18-19[7]). Indeed, the ALJ noted the paradox stating "[t]he General Counsel briefed this case as an interrogation rather than a polling case." (ALJD, 4:21-22). But, CGC cannot inject a new theory into the case after trial. Ridgewood Health Care Ctr., Inc., 367 NLRB No. 110, 2019 WL 142575, at *12 n.18 (Apr. 2, 2019) (reversing administrative law judge, and holding new theory was not properly pled because it was "[n]either [in] the complaint nor any of the underlying charges" and "[t]he General Counsel did not present argument in support of this theory of violation until his post-hearing brief").

CGC elected to propound a "polling" theory deficient on its face and the ALJ correctly dismissed that claim. The ALJ also correctly determined that there was no unlawful interrogation. But, CGC did not amend or even attempt to amend the complaint to allege an unlawful interrogation claim, and such a claim cannot be raised after trial in a post-hearing brief. Thus, the ALJ could have and should have dismissed the "interrogation" theory for this reason alone.

III. CONCLUSION

The ALJ correctly found that the complaint allegations were meritless and dismissed the complaint in its entirety. While the CGC has taken exceptions, those exceptions are meritless and, as the ALJ determined, the complaint is due to be dismissed. However, in an abundance of caution,

[7] Available at https://www.nlrb.gov/case/10-CA-226249

MBUSI files these cross-exceptions which also show MBUSI did not violate the Act, but for additional and different reasons than those found by the ALJ.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed with the NLRB via Electronic Filing, a copy has also been served via email and/or U.S. First-Class Mail on the following, on this the 6th day of September, 2019:

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